

STATE OF MICHIGAN
COURT OF APPEALS

ZACK WEISHUHN and PATRICK J. TOMSIC,

Plaintiffs-Appellees,

v

KWAME KILPATRICK and ELLA BULLY-
CUMMINGS,

Defendants-Appellants.

UNPUBLISHED

March 7, 2006

No. 264414

Wayne Circuit Court

LC No. 05-501554-CZ

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendants, Detroit's mayor and chief of police, respectively appeal as of right from the circuit court's order denying their motion for summary disposition predicated on governmental immunity. We affirm and lift the stay previously imposed. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiffs are police officers for the City of Detroit. While on duty, they stopped a car driven by the mayor's chief of staff. According to plaintiffs' complaint, the driver screamed, "Do you know who the f_ _ _ [sic] I am?", then called Bully-Cummings. Plaintiffs' supervisor arrived at the scene, spoke also to Bully-Cummings, and instructed plaintiffs not to issue a citation. Afterward, Bully-Cummings told a newspaper reporter and other members of the media that plaintiffs had "harassed" the driver, and Mayor Kilpatrick said, during a radio interview, that plaintiffs "had set [his chief of staff] up and that the traffic stop was 'the biggest piece of crap'"

Plaintiffs filed suit alleging slander per se, plus invasion of privacy and false light. Defendants moved for summary disposition, asserting governmental immunity. MCR 2.116(C)(7). The trial court denied the motion on the ground that defendants were not alleged to have been speaking in furtherance of their governmental functions.

When deciding a motion under (C)(7), the court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. See *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). We review a trial court's decision on a motion for summary disposition de novo. *Id.*

A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority. [MCL 691.1407(5).]

Defendants' statuses as executive officials as described above are not in dispute. At issue is whether they spoke the words of which plaintiffs make issue in furtherance of their official duties. "The determination whether particular acts are within [executive] authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, . . . and the structure and allocation of powers in the particular level of government." *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988).

The Attorney General's immunity covers descriptions of certain business operators as "crooks" engaging in "fraudulent" activity, if offered in the course of reporting on the results of an official investigation. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 137, 144; 560 NW2d 50 (1997).

In this case, defendants do not suggest that they delivered the remarks in question in the context of reporting on an investigation, but argue nonetheless that these public officials' comments to the media constituted official action. We disagree. Expressing personal opinions to the media about a matter in the news, under circumstances that imply that the remarks are no more deeply rooted in officialdom than that, is not official conduct. The trial court correctly held that not every remark of the mayor or police chief comes in furtherance of their respective duties, and that that was the case here.

Because defendants are not implicated in their official capacities, the trial court properly rejected the argument that they enjoyed governmental immunity.

Defendants alternatively moved for summary disposition on the ground that plaintiffs had failed to plead a valid cause of action. MCR 2.116(C)(8). However, their failure to obtain summary disposition on that ground is not part of this appeal by right. MCR 7.202(6)(a)(v) and 7.203(A)(1)(b). Further, the trial court did not address that issue, and in fact expressed ambivalence concerning whether Mayor Kilpatrick's "gratuitous words" might be "actionable". Moreover, the parties only incompletely brief the (C)(8) issue. In light of this lack of development, below and on appeal, we decline to reach and resolve it, and express no opinion on its merits.

Affirmed; stay lifted.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald